

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9468 of 1996

AND

SPECIAL CIVIL APPLICATION No 7895 of 1997

AND

SPECIAL CIVIL APPLICATION No 2462 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

NAVINCHANDRA NANALAL KIKLAWALA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 9468 of 1996
MR MIHIR H JOSHI for Petitioners
MR MANKAND ASSTT GOVT PLEADER for Respondent No. 1
MR MUKESH R SHAH for Respondent No. 2
MR KS JAVERI for Respondent No. 3
MS KJ BRAMBHATT for Respondent No.4
2. Special Civil ApplicationNo 7895 of 1997
MR NAGESH SUD for Petitioners
MR MANKAD ASSTT GOVT PLEADER for Respondent No.1&2

MR MUKESH R SHAH for Respondent No. 3
MR MIHIR JOSHI for Respondents No.4 & 5

3.Special Civil Application No : 2462 of 1998

MR.KS ZAVERI for the Petitioner No.1
MS KJ BRAMBHATT for Petitioner No.2
MR. MANKAD for Respondent No.1 & 2
MR. MR SHAH for the Respondent No.3
MR MIHIR JOSHI for the Respondent No.4 & 5

CORAM : MR.JUSTICE M.R.CALLA
Date of decision: 03/03/99

ORAL COMMON JUDGEMENT

#. The facts of these three cases present a lis between the three petitioners viz. Navinchandra Nanalal Kiklawala and another, its tenant Pachubhai Matrubhai Pathak and Adulhusain Rasulbhai Kagalwala Trust and Dahod Nagar Palika. The dispute centres around the town planning scheme which was sanctioned on 2-6-1977 and published on 30th April, 1981. Since the subject matter of controversy of all the three petitions is with regard to the implementation of this town planning scheme dated 2-6-1977, the Court proposes to decide all these three Special Civil Applications by this common Judgment and order. The land of the petitioners in Special Civil Application No.9468 of 1996 was originally allotted Revenue Survey No.3/E and thereafter City Survey No.453/E admeasuring about 2156 sq.mtrs. Adjacent to the aforesaid land, there was plot bearing Revenue Survey No.2/A belonging to Abdulhussein Rasulbhai Kagalwala Trust (the petitioner in SCA 2462 of 1998). This plot of Abdulhussein Rasulbhai Kagalwala Trust was a plot admeasuring 2059 sq.mts. Certain construction was put up on the aforesaid plot bearing Revenue Survey No.2/A by the above mentioned trust. With reference to the Bombay Town Planning Act, 1955, a town planning scheme for Dahod came to be finalised after following the due procedure of law, being Town Planning Scheme No.1 of Dahod. This finalised scheme dated 2-6-1977 was published in the official gazette on 30-4-1981. According to this scheme, the plots belonging to the petitioners in Special Civil Application No.9468 of 1996 and Abdulhussein Rasulbhai Kagalwala Trust were reconstituted and certain portion of plot bearing Survey No.3/E was hived off for the purpose of garden and open air theatre and it was allotted final Plot No. 88 under the Town Planning Scheme. As compensation for the aforesaid land, the petitioners of Special Civil Application No : 9468 of 1996, were allotted certain portion of the land admeasuring 916.62

sdq.mtrs plot bearing Revenue Survey No.2/A out of the land belonging to the aforesaid trust. The reconstituted plot No. 3/E of the petitioners in Special Civil Application No.9468 of 1996 was allotted as Final Plot No.19 admeasuring about 1670.25 sq.mtrs. Under this scheme, the plot bearing Survey No2/A belonging to the trust was allotted Final Plot No.20 admeasuring 1142 sq.mtrs. Whereas the portion of the plot, bearing survey No.2/A belonging to the trust which came to be allotted to the petitioners in Special Civil Application No.9468 of 1996 by way of reconstitution, was in possession and occupation of the trust, the grievance of the petitioner in Special Civil Application No.9468 of 1996 is that they could not enjoy the possession of the aforesaid portion of the property and therefore they represented to the Department of Urban Development and Town Planning, Gandhinagar and the Dahod Nagarpalika for ensuring that vacant and peaceful possession of the aforesaid property be handed over to them. It may also be mentioned that one Shri Pachubhai Matrubhai Pathak the petitioner in Special Civil Application No : 7895 of 1997, claims to be tenant in the part of the property in question belonging to the petitioners in Special Civil Application No.9468 of 1996. The grievance of the petitioners in Special Civil Application No.9468 of 1996 is that Dahod Nagar Palika did not implement this Town Planning Scheme despite their repeated requests and on 27th June, 1989 for the first time, they were served with the notice to hand over the vacant possession of the part of the original plot No.19 reconstituted as Final Plot No.88 under the aforesaid Town Planning Scheme. The trust was also issued similar notice to hand over the vacant and peaceful possession of the part of the plot bearing Revenue Survey No.21 A reconstituted as part of the Final Plot No.19. The petitioners in Special Civil Application No.9468 of 1996 sent a letter to the Administrator of Dahold Nagar Palika on 18th June, 1994 requesting to obtain possession of the part of the Plot bearing Revenue Survey no.2/A which was still in possession of the trust and they also addressed a letter dated 3rd September, 1996 to the Department of Urban Development and Town Planning as also Dahod Nagar Palika to discharge their statutory functions. When the efforts as above did not yield any result, the petitioners in Special Civil Application No.9468 of 1996 filed Special Civil Application as above, seeking direction against the respondent Nagar Palika to hand over vacant and peaceful possession of the entire reconstituted plot. This Special Civil Application was decided and allowed by the Single bench of this Court on 4th July, 1997 and a direction was issued to the respondent Municipality to

discharge their statutory functions and duties and hand over vacant and peaceful possession of the property allotted to the petitioners under the Scheme and for that purpose 9 (nine) months time was granted to comply with their obligations under the scheme and the rule was made absolute accordingly. It may be mentioned that the petitioner Pachubhai Matrubhai Pathak i.e. petitioner in Special Civil Application No.7895 of 1997 was not a party to these proceedings in Special Civil Application No.9468 of 1996. This petitioner Pachubhai Matrubhai Pathak instead of availing remedy of filing Letters Patent Appeal in his capacity as aggrieved party against this order dated 4th July, 1997, preferred Special Civil Application No.7895 of 1997 in October, 1997 seeking direction for possession of part of the final plot No.19 in the Town Planning Scheme No.1 of Dahod Nagar Palika admeasuring 1050 sq.mtrs. and further relief is sought that his possession may not be disturbed without allotting him any other land. However, the trust i.e. the petitioner in Special Civil Application No : 2468 of 1998 challenged the order dated 4th July, 1997 passed by the Single Bench in Special Civil Application No. 9468 of 1996 through Letters Patent Appeal No. 379 of 1998. This Letters Patent Appeal was decided and allowed on 1-5-1998 on the ground that the appellant which was initially a party was deleted had no opportunity of having his say in the matter and the case was decided on merits by the Single Bench. On this basis, the order dated 4th July, 1997 was set aside and the matter was remanded back for decision in Special Civil Application No.9468 of 1996 by the Division Bench in terms of its order dated 1-5-1998 and this is how this Special Civil Application No.9488 of 1996 has again come up for hearing. However, the trust had also filed Special Civil Application No.2462 of 1998 in March, 1998 seeking an order not to disturb its possession of Final Plot No.20 of Town Planning Scheme No.1 of Dahod Nagar Palika admeasuring 900 sq.mtrs. without allotting other land to the said trust. Thus, the petitioners in these three Special Civil Applications i.e. Special Civil Application No.9468 of 1996 filed on 4-11-1996, Special Civil Application No : 2462 of 1998 filed on 26th March, 1998 and Special Civil Application No.7895 of 1997 filed on 22nd October, 1997 are before this Court and while the petitioners in Special Civil Application No.9468 of 1996 are seeking direction for implementation of Town Planning Scheme No.1 as aforesaid, the petitioners in Special Civil Application No : 7895 of 1997 and 2462 of 1998 are seeking direction not to disturb the possession of the portion of the land held by them in the land which is the subject matter of the Town Planning Scheme.

#. While no written reply has been filed on behalf of the State of Gujarat through concerned Department i.e. Urban Development and Town Planning, Dahod Nagar Palika has sought to contest this petition on the ground that it has asked the Town Planning Department to vary the scheme so that it does not have to face an ordeal of the procedure for eviction of either the trust / its tenant or the aforesaid petitioners Pachubhai Matrubhai Pathak. In order to show that it has applied for variation in the Town Planning Scheme, an additional affidavit dated 25th November, 1998 along with the document - letter dated 5-11-1998 and the Resolution passed by the Dahod Nagar Palika has been placed on record today during the course of arguments by the learned counsel Mr.M.R.Shah.

#. I have heard learned counsel for all the parties. There is no dispute about finalisation of the Town Planning Scheme way back on 2-6-1977 and its publication on 30-4-1981. Dahod Nagar Palika was also under obligation to implement the said scheme in accordance with law keeping in view the rights of all concerned but the implementation has not been done only on the ground that it has applied for variation of the scheme. For this purpose, Mr.Shah has made reference to Section 71 of the Gujarat Town Planning and Urban Development Act, 1976. Section 71 reads as under;

"Variation of town planning scheme by another scheme.

Notwithstanding anything contained in Section 70,
a town planning scheme may at any time be varied
a subsequent scheme made, published and
sanctioned in accordance with the provisions of
this Act."

#. This section only permits the variation of Town Planning Scheme by any subsequent scheme made published and sanctioned in accordance with the provisions of this Act. The Nagar Palika cannot claim this variation as a matter of right nor it can avoid the implementation of finalised and published Town Planning Scheme on the ground that it has sought the variation of this Scheme. Therefore, mere permissibility of variation in Town Planning Scheme by subsequent scheme does not authorise the Nagar Palika to avoid implementation of the scheme. Section 71 of the Act as reproduced above, is only in the nature of an enabling provision with the Town Planning Department for the purpose of varying the finalised scheme at subsequent stage by subsequent scheme. But it

is for the Town Planning Department to consider as to whether any scheme is required to be varied or not. May be that the Dahod Nagar Palika has requested the Town Planning Department to vary the scheme, the fact remains that till this date, the Department has not accepted any variation, on the contrary, there is document placed on record along with additional affidavit filed on behalf of Dahod Nagar Palika itself, in which, the Chief Town Planner has categorically mentioned that the proposals made by the Nagar Palika did not require any change or variation in the Scheme in public interest. Having said so categorically that no variation was required in public interest with the already finalised and published scheme, the Chief Town Planner has made further mention to the letter dated 9-5-1997 that with reference to Section 41(1) of the Act which only refers to the appropriate authority to resolve and declare an intention to make a scheme and it appears that query as to whether steps which were required to be taken under Section 41 (1) had been taken or not. In such a fact situation, even if it is assumed that the proposals of Dahod Nagar Palika with regard to variation in the scheme, are pending with the Town Planning Department, the fact remains that the Town Planning Department has categorically observed in office letter dated 21-7-1998 sent to the Dahod Nagar Palika that no variation was required in public interest. As on today, the scheme which was finalised in 1977 and published in 1981 holds good and while the implementation of this Town Planning Scheme has remained the subject matter of litigation before this Court, the same has not been implemented. The ground on which the implementation was resisted by Dahod Nagar Palika is far from convincing and devoid of any justification. The Gujarat Town Planning and Urban Development Act, 1976 provides effect of preliminary scheme through Section 67, power of appropriate authority to evict summarily through Section 68 and the power to enforce the Scheme under Section 69. If at all, Dahod Nagar Palika thinks that certain part of the land of this scheme is occupied by Shri Pachubhai Matrubhai Pathak as claimed tenant of the petitioner of Special Civil Application No : 9468 of 1996 or any part of the land of the same scheme which is occupied and held by any tenant of the trust i.e. petitioners of Special Civil Application No : 2468 of 1998 and the same is required to be given to the petitioners in Special Civil Application No.9468 of 1996 by way of compensation, there are enough and adequate provisions in the Act to deal with the situation for evicting them out. It is very clear from the reading of Section 67 (a) that all such lands which are part of the finalised and published Town Planning Scheme vests in the appropriate authority free

from all encumbrances and therefore, it is for the Dahod Nagar Palika to put its machinery in action in accordance with the provisions of Section 67, 68 and 69 of the Gujarat Town Planning and Urban Development Act, 1976 read with the procedure prescribed in Rule 33 of the Gujarat Town Planning and Urban Development Rules 1979 to give effect to the provisions of the Act. Merely because the tenants of any party are occupying the part of the land of Town Planning Scheme and merely because the Nagar Palika has applied for variation in the scheme, is therefore, no answer against the non implementation of the statutory Town Planning Scheme. The body like Nagar Palika was to remain in full coordination with the Town Planning Department and once the legislature has taken care to arm the appropriate authorities like Nagar Palika to deal with the situations which may obstruct the implementation of the Town Planning Scheme, such provisions have to be given effect to. Section 67, 68, 69 and Rule 33 of the aforesaid Act and Rules are reproduced as under;

67. Effect of the preliminary scheme.

On the day on which the preliminary scheme comes into force-

- (a) all lands required by the appropriate authority shall, unless it is otherwise determined in such scheme, vest absolutely in the appropriate free from all encumbrances;
- (b) all rights in the original plots which have been reconstituted into final plots shall determine and the final plots shall become subject to the rights settled by the town Planning Officer.

After preliminary scheme comes into force all lands shall vest free from all encumbrances in appropriate authority.

68. Power of appropriate authority to evict summarily.

"Variation of town planning scheme by another scheme.

Notwithstanding anything contained in Section 70, a town planning scheme may at any time be varied a subsequent scheme made, published and

sanctioned in accordance with the provisions of this Act."

69. Powr to enforce scheme.

(1) on and after the date on which the preliminary scheme comes into force, the appropriate authority shall, after giving the prescribed notice and in accordance with the provisions of the scheme,

(a) remove, pull down, or alter any building or other work in the area included in the scheme which in such as contravenes the scheme or in the erection or carrying out of which any provision of the scheme has not been complied with;

(b) execute any work which it is the duty of any person to execute under the scheme in any case where it appears to be appropriate authority that delay in the execution of the work would prejudice the efficient operation of the scheme.

(2) any expenses incurred by the appropriate authority under this section shall be recovered from the person in default or from the owner of the plot in the manner provided for the recovery of sums due to the appropriate authority under the provisions of this Act.

(3) If any question arises as to whether any building or work contravenes a town planning scheme or whether any provision of a town planning scheme is not complied with in the erection or carrying out of any such building or work, it shall be referred to the State Government and the decision of the State Government shall be final and binding on all persons.

(4) No persons shall be entitled to compensation in respect of any damage, loss or injury resulting from any action taken by the appropriate authority under the provisions of this section except in respect of the building or work begun before the date referred to in sub section (1) and only in so far as such building or work has proceeded until that date:

Provided that any claim to compensation, which is not barred by this sub section shall be

subject to the condition of any agreement entered into between the claimant and the appropriate authority.

- (5) The provisions of this section shall not apply to any operational construction undertaken by the Central Government or a State Government.

Rule 33. Procedure for eviction under Section 68 (1) For eviction under Section 68, the appropriate authority shall follow the following procedure, viz.-

- (a) The appropriate authority shall in the first instance serve a notice upon a person to be evicted requiring him, within such reasonable time as may be specified in the notice, to vacate the land.
- (b) If the person to be evicted fails to comply with the requirement of the notice, the appropriate authority shall depute any officer or Servant to remove him.
- (c) If the person to be evicted resists or obstructs the officer or Servant deputed under clause (b) or if he re-occupies the land after eviction, the appropriate authority shall prosecute him under section 188 of the Indian Penal Code."

These provisions make it clear that, if these provisions are resorted to, obstructions as are being pointed out by the Dahod Nagar Palika, may be removed and had any effort or endeavour been made by the Nagar Palika, by this time all these difficulties would have been solved. Such provisions are made in the enactment only to see that the Town Planning Schemes and the development activities which are undertaken by the concerned department reach their logical result for the benefit of all concerned. This Court therefore finds that the Nagar Palika was under statutory obligation to carry out the scheme as the same was finalised in the year 1977 and was published in 1981 and in any case, once the Town Planning Department had expressed in no uncertain terms that it was not in public interest to vary the sanctioned Town Planning Scheme, the Nagar Palika ought to have implemented the scheme in right earnest without any loss of time.

#. The contentions raised on behalf of the petitioner Trust in Special Civil Application No : 2462 of 1998 based on Section 20 is with regard to the acquisition of land and it cannot be invoked in the facts of the present case as it applies only when the land is designated. Even Mr.Shah appearing for the Nagar Palika has submitted that Section 20 is not at all applicable to the fact situation of the present case, inasmuch as, it is not a case in which the land has been designated. The arguments based on Section 20 therefore fail. The petitioner trust is not entitled to seek a direction that their possession may not be disturbed on the land which forms part of the Town Planning Scheme. Mr. Sood appearing for the petitioner in Special Civil Application No.7895 of 1997 has cited the case of MANSUKHLAL JADAVJI DARJI VS. AHMEDABAD MUNICIPAL CORPORATION, reported in AIR 1992 S.C. 752 and has submitted that even if he is a tenant, a notice has to be given to him and his possession cannot be disturbed without notice to him. In this decision, while the Hon'ble Supreme Court held that Sub Rule (3) and (4) of Rule 21 of Bombay Town Planning Rules, 1955 were mandatory and the non observance of their requirements entailed the vitiation of the scheme. However, the court considered that it was not necessary to push the matter to its logical conclusion in view of the obvious public inconvenience and difficulties arising from such invalidation and while referring to earlier decision of the Supreme Court, reported in 1991 AIR SCW 2515 para 16, a relief was granted by directing the Municipal Corporation to provide suitable accommodation of rent in the suitable locality. However, so far as the facts of the present case are concerned, it is clearly born out from the pleadings of the parties in Special Civil Application No.7895 of 1997 that a notice had been given to the petitioner - Pachubhai Matrubhai Pathak by Dahod Nagar Palika. The notice dated 5-10-1996 which was given to the petitioner Pachubhai Matrubhai Pathak is on record as Annexure I at page 38 in Special Civil Application No : 7895 of 1997. Mr.M.R.Shah on behalf of the Nagar Palika has also pointed out that notice has also been given earlier and notice has also been given later on after the order of this Court dated 4th April, 1997. He submits that the copy of the said notice has been place on record along with the affidavit dated 12th February, 1998. However, such affidavit or notice are not found to be included in the file which is available with the court at the time of hearing of this matter. But Mr.Sood, appearing for the claimed tenant Pachubhai Matrubhai Pathak himself was fair enough to show from his own file, a copy of such notice dated 27th June, 1989 issued under the Signature of Chief Officer of Dahod

Nagar Palika. In this view of the matter, the argument raised on the basis of the aforesaid decision rendered by the Hon'ble Supreme Court, cannot be said to be available to the petitioner Pachubhai Matrubhai Pathak and he is not entitled to relief that his possession may not be disturbed. So far as the question of providing alternative accommodation, to the petitioner Pachubhai Matrubhai Pathak in Special Civil Application No. 7895 of 1997 - and to the trust as its tenant is occupying the part of the land of this scheme, is concerned, it is for the Nagar Palika to consider their request in accordance with law. No direction in this regard can be issued by this Court in the facts and circumstances of this case. Ms.Kalpna J. Brambhatt appearing for the respondent No.4 (tenant of the trust) in Special Civil Application No : 9468 of 1996 has only adopted the argument advance by Shri K.S.Javeri, the learned counsel appearing for the respondent No.3 in Special Civil Application No : 9468 of 1996 and the same have already been dealt with as above.

#. The result of the aforesaid adjudication is that;

- (i) the Special Civil Application No.7895 of 1997 and 2462 of 1998 fail and the same are hereby dismissed and the Rule is discharged in both these Special Civil Applications with no order as to costs.
- (ii) Special Civil Applications No.9468 of 1996 succeeds and the same is allowed accordingly and Dahod Nagar Palika is directed to implement the Town Planning Scheme No.1 in question which was finalised on 2-6-1977 and was published on 30th April, 1981 in accordance with the provisions contained in Gujarat Town Planning and Urban Development Act, 1976 and the Rules made thereunder, at the earliest possible time without any further loss of time and in no case later than 30th June, 1999. Rule is accordingly made absolute in Special Civil Application No : 9468 of 1996.

Date ; 3-3-1999

*kailash